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In The
Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, and MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF MANUFACTURED HOUSING INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the proposition that "post-enactment purchasers cannot challenge a regulation under the Takings Clause." *Id.* at 626. In this case, a divided *en banc* panel of the Ninth Circuit distinguished *Palazzolo* on the basis that the plaintiff there had acquired the property by operation of law (instead of purchasing it) and held that the fact the petitioners there had purchased the property subject to the challenged regulation was "fatal to [petitioners'] claim."

Is the purchaser of property subject to a regulatory restriction foreclosed from challenging the restriction as a violation of the Takings Clause?

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Manufactured Housing Institute (MHI) is a national trade association representing all segments of the manufactured housing industry including manufacturers, lenders, community owners, and retailers.[1] MHI is interested in protecting the constitutional rights of property owners, including the Fifth Amendment rights of mobile home park owners like Petitioners. *Cf. Manufactured Home Communities, Inc. v. County of San Luis Obispo*, 84 Cal. Rptr. 3d 367, 370 (Cal. Ct. App. 2008) ("The Constitution protects everyone, the poor, the wealthy, the weak, the powerful, the guilty and the innocent. . . . Here we add to our list, mobilehome park owners.").

MHI participated as amicus curiae in the court below. In this brief, MHI seeks to provide the Court with an additional viewpoint on the issues, and to urge the Court to grant the petition for certiorari and either reverse, or schedule the case for full briefing and argument.

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[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus made a monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A property owner's right to make reasonable use of her land does not evaporate simply because restrictive regulations predate her acquisition. Purchasers of property subject to restrictive regulations maintain all of the rights protected by the Fifth Amendment and may assert a takings claim.

In *Palazzolo*, this Court confirmed these principles, and recognized that regulations do not become part of a parcel's "background principles" simply because the property is transferred to a new owner. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In that case, the Court rejected the so-called "notice rule," the assertion that a property owner is "deemed to have notice of an earlier-enacted restriction . . . and is barred from claiming that it effects a taking." *Id.* at 626. Such a rule would allow the state "to put an expiration date on the Takings Clause." *Id.* at 627. The Ninth Circuit majority, however, treated that holding as a mere "rhetorical flourish,"[2] concluding

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[2] *See Guggenheim v. City of Goleta*, No. 06-56306, Video of Oral Argument, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (June 22, 2010), http://www.ca9.uscourts.gov/media/view_subpage.php?pk_vid=0000005941:

> JUDGE KLEINFELD: I just don't see where *Palazzolo* helps you much. I mean that was a 100% shareholder in a corporation that owned real estate. He didn't maintain his corporate status properly, with the fees, annual filings, the statements in the records whatever it was, so the corporation automatically became defunct, and the 100% shareholder now became the holder of title to the real estate instead of the

(Continued on following page)

the fact that the Guggenheims purchased their property after the county's rent control regime became effective was "fatal" to their regulatory takings claim. Pet. App. 18a.

More than thirty years ago in *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978), this Court established a three-factor framework for analyzing most regulatory takings claims, and this standard has been recently reaffirmed as the "default" test. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005). *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)

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corporation in which he held 100% of the shares. The Government said well gee, the taking was from somebody else, he can't recover, and the Supreme Court said yes he can. And in that circumstance, the economic value was taken from him either way. And it was well within the statute of limitations.

MR. COLDREN: Except Judge Kleinfeld, that the *Palazzolo* court uses that as an occasion to talk about how there's no expiration date on the Constitution. To talk about how we're not going to stick such a Hobbesian stick . . .

JUDGE KLEINFELD: We all enjoy using those rhetorical flourishes in opinions, but we still have to look at the facts and the holding.

MR. COLDREN: Yes, and the facts of *Palazzolo* and the holding of *Palazzolo* is that future generations also have the right to rely upon the constitutional protections.

("Our polestar . . . remains the principles set forth in *Penn Central* itself," which require a "careful examination and weighing of all the relevant circumstances[.]")). These circumstances include consideration of "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations[, and] the character of the governmental action[.]" *Penn Central*, 438 U.S. at 124 (cited in *Lingle*, 544 U.S. at 538-39).

Because this framework eschews any "set formula" and relies instead on "essentially ad hoc, factual inquiries," it is, by its very nature, incapable of being subject to the rigid per se "notice" rule rejected by this Court in *Palazzolo*, but revived by the Ninth Circuit *en banc* majority. The decision below ignored the requirement of a "weighing of all the relevant circumstances," and under the "fatal" notice rule, when a buyer purchases property subject to restrictive regulation, the remaining two *Penn Central* factors become irrelevant. The Ninth Circuit's rejection of *Palazzolo* is apparently based on nothing more than caprice, since it offered no analysis or rationale in support, but instead established a bright-line rule focused solely on the court's misperception of the Guggenheims' investment-backed expectations. It assumed, without any evidence to support it, that the cost of Goleta's rent control ordinance was factored into the purchase price. *See* Pet. App. 18a ("Since the ordinance was a matter of public record, the price they paid for the mobile home park

doubtless reflected the burden of rent control they would have to suffer.").

Yet, the Ninth Circuit's decision – as inexplicable as it is in light of this Court's rejection of the notice rule in *Palazzolo* – is not terribly surprising, given the difficulty the lower courts have had in applying *Palazzolo*'s clear holding. The Ninth Circuit is not the only court that is unable – or unwilling – to correctly follow *Palazzolo*. Lacking this Court's guidance, the default regulatory takings test has become a standardless exercise in judicial intuition, hidden behind a gloss of objectivity and faulty economic assumptions.

This brief addresses two issues. *First*, it details the varying approaches the lower courts have taken in applying *Palazzolo*'s rejection of the notice rule. Some courts, like the Ninth Circuit, simply ignore it. Others view preexisting regulations as a limit on an owner's "property," while others apply it as just one factor in the *Penn Central* analysis. This Court should grant the petition to resolve the differences. *Second*, this brief highlights the Ninth Circuit's erroneous assumption that it is the prior owner's rights which are at issue in this case, and not the Guggenheims' right to make reasonable use of their property which were infringed upon by the city's regulations.

ARGUMENT

I. THE NINTH CIRCUIT ADDED TO THE DIVIDE IN THE LOWER COURTS ON HOW (OR WHETHER) TO APPLY *PALAZZOLO*'S REJECTION OF THE "NOTICE" RULE

The Ninth Circuit joined the growing list of courts that have revived some variant of the notice rule, holding that a preexisting regulation cuts off a property owner's ability to raise a takings claim.

Some courts, like the Ninth Circuit, view preexisting regulations as "fatal" to a property owner's takings claim. Pet. App. 18a. Other courts misapply *Palazzolo* in a different way but reach similar results, concluding that preexisting regulations are part of the property's "background principles," thus diminishing a purchaser's title and implicitly holding that the post-regulation purchaser owns less "property" than her predecessor. Other courts adhere to *Palazzolo*, concluding that "notice" is either entirely irrelevant or merely one factor to be considered.

A. Preexisting Regulations As Background Principles

According to the "storied but cryptic formulation" in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), while property may be regulated to a certain extent, "'if regulation goes too far it will be

recognized as a taking.'" *Lingle*, 544 U.S. at 537 (quoting *Mahon*, 260 U.S. at 415). In other words, government's power to enact regulations affecting private property operates on a continuum, and when it crosses an equitable boundary determined in most cases by reference to a multitude of case-specific facts, the label attached to the exercise of power is irrelevant, and what matters is the impact of the regulation on the owner.[3] "The rub, of course, has been – and remains – how to discern how far is 'too far.'" *Lingle*, 544 U.S. at 538.

In some cases, it is easy. This Court has established two categories of regulations that are *per se* takings. First, "where government requires an owner to suffer a permanent physical invasion of

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[3] *See Mahon*, 260 U.S. at 415 (Kohler Act enacted pursuant to state's police power went "too far"); *Andrus v. Allard*, 444 U.S. 51, 64 n.21 (1979) (federal power to protect endangered species measured against Takings Clause; "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); *Lingle*, 544 U.S. at 537 (This Court "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such 'regulatory takings' may be compensable under the Fifth Amendment.").

her property – however minor – it must provide just compensation." *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (law requiring property owners to allow installation of a small cable box on buildings was a taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (agency required landowner to dedicate public easement as a condition of development approvals). Second, a *per se* taking also occurs when a regulation deprives an owner of "'all economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis omitted)). In *Lucas*, this Court noted an exception to the *per se* rules:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas, 505 U.S. at 1029.

After *Lucas*, some courts treated pre-acquisition regulations as part of the "background principles" inherent in title. Under this theory, a post-regulation purchaser does not possess Constitutionally-recognized "property," and thus cannot assert a takings claim. *See, e.g.*, *CRV Enters. v. United States*, 86 Fed. Cl. 758, 770 (2009) (plaintiff did not own the property at the time of the taking and thus did not have a "valid property interest" entitling it to compensation), *aff'd*,

626 F.3d 1241 (Fed. Cir. 2010), *petition for cert. filed* No. 10-1151 (Mar. 17, 2011).

The most recent example is the Federal Circuit's decision in *CRV Enters., Inc. v. United States*, 626 F.3d 1241 (Fed. Cir. 2010), a case in which the court concluded a property owner could not assert a takings claim since it did not own the property at the time of the alleged taking. *Id.* at 1250. In that case, the owner of a riparian parcel asserted that the agency's installation of a log boom in a waterway adjacent to its parcel cut off its riparian access and was a taking. The court first rejected the claim that the installation of the log boom was a physical taking. *Id.* at 1246. The court next concluded that the regulatory taking did not take place at the time the agency installed the log boom, but must have been brought years before when it *decided* to install it. *Id.* at 1248-49. Because CRV had not yet acquired the property at that time, the Federal Circuit – like the Ninth Circuit in the case at bar – simply halted its analysis and affirmed the dismissal of CRV's takings claim. The court concluded that a takings claim "if it existed, was owned by the prior owner." *Id.* at 1250.[4] The court held that "plaintiffs did not own

[4] The Federal Circuit also rejected the argument that the prior owner, by "assign[ing] his rights to CRV" had also transferred his takings claim, concluding that such transfer would violate the Assignment of Claims Act, 31 U.S.C. § 3727(b), and would be ineffective. *See CRV*, 626 F.3d at 1249 n.7.

the property at the time of the alleged regulatory taking and therefore lacked standing." *Id.* at 1249.

Even though the Federal Circuit couched its analysis in terms of "standing" and not on *Lucas* background principles, its decision that the post-regulation transfer of property barred the takings claim was plainly grounded in the idea that the plaintiff did not possess "property" protected by the Fifth Amendment from uncompensated *de facto* acquisition.[5]

But unlike the Ninth Circuit, the Federal Circuit has in other cases selectively applied *Palazzolo*'s plain meaning, which highlights inconsistent and uneven approaches to the issue. For example, in *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009), the court applied the *Palazzolo* rule faithfully. The court concluded that a preexisting regulation was not a categorical bar to a takings claim, but "is a factor that may be considered, depending on the circumstances," and that this Court in *Palazzolo* "reject[ed] the argument that one who acquires title after the relevant regulation was enacted could never bring a takings claim." *Id.* at 1366. "Background principles," not "pre-existing regulations" are the relevant factor against which the regulation is judged, and while a widely accepted history of regulatory infringement on an owner's

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[5] The property owner's petition for certiorari in *CRV* is also pending before this Court, and amicus respectfully suggests that these petitions should be considered together.

freedom to do what she wishes with her property may over time develop into a "background principle," the challenged regulation is not a contributor to the analysis.

B. "Notice" As Limiting Investment-Backed Expectations

A second approach to analyzing the effect of preexisting regulation involves regulatory takings challenges outside of the two "relatively narrow" classes of physical invasions and economic wipeouts, which are analyzed by the three-part *Penn Central* standard. In that case, this Court "acknowledged that it had hitherto been unable to develop any set formula for evaluating regulatory takings claims, but identified several factors that have particular significance." *Penn Central*, 438 U.S. at 124. Those factors include: (1) the "economic impact" of the government action or regulation; (2) how this action "interfere[s] with distinct investment-backed expectations;" and (3) the "character" of the regulation or government action. *Id.* (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)). The *Penn Central* inquiry is inherently fact-based, and "depends largely upon the particular circumstances [in each] case." *Id.* Questions of economic viability, the property owner's expectations, and diminution of use and value are factual inquiries. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-21 (1999) ("[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question . . . [and that] question is for the jury.").

Like the Ninth Circuit, some courts view regulations which predate acquisition as destroying investment-backed expectations, obviating the need to consider the economic impact of the regulation, or the character of the government action. These courts transform the investment-backed expectations factor into the dispositive consideration. Despite the Court's recent caution that no *Penn Central* factor is entitled to conclusive weight, *Lingle*, 544 U.S. at 539-40, the Ninth Circuit asserted that Goleta's rent control ordinance was not a taking only because the Guggenheims purchased their mobile home park after the county's ordinance was in place, and the court needed to look no further. For example, the Federal Circuit has recognized *Palazzolo*'s rejection of a *per se* bar on post-regulation takings claims, but has created an end-run around the holding by considering notice as dispositive in the investment-backed expectations inquiry. *See Norman v. United States*, 429 F.3d 1081, 1092-94 (Fed. Cir. 2005) (noting the *Palazzolo* rule that a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction," but finding no reasonable investment-backed expectations where plaintiff had actual and constructive knowledge of wetlands restrictions); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (recognizing *Palazzolo*, but concluding "that Appolo's reasonable investment-backed expectations are shaped by the regulatory regime in place as of the date it purchased the leases at issue.").

Even assuming that preexisting regulations had some impact on a property owner's investment-backed expectations, it was plainly wrong for the Ninth Circuit to stop its *Penn Central* analysis there, and not consider the devastating economic impact of Goleta's rent control regulation on the Guggenheims, or the character of the government action (a naked wealth transfer, with only narrow classes of citizens being benefitted and burdened). For example, in *Hodel v. Irving*, 481 U.S. 704 (1987), this Court found that the plaintiffs – heirs who stood to inherit extremely small fractional interests in Indian land – had "dubious" investment-backed expectations when challenging a federal statute that escheated their decedents' interests to their tribes, and virtually destroyed the right to pass on property to heirs. *Id.* at 715 ("The extent to which any of appellees' decedents had 'investment-backed expectations' in passing on the property is dubious. Though it is conceivable that some of these interests were purchased with the expectation that the owners might pass on the remainder to their heirs at death, the property has been held in trust for the Indians for 100 years and is overwhelmingly acquired by gift, descent, or devise."). The Court also held that the economic impact on the plaintiffs was minimal. *Id.* However, the Court found a taking by applying the third *Penn Central* factor:

> If we were to stop our analysis at this point, we might well find § 207 constitutional. But the character of the Government regulation

> here is extraordinary. . . . Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property – the small undivided interest – to one's heirs. In one form or another, the right to pass on property – to one's family in particular – has been part of the Anglo American legal system since feudal times.

Id. at 716-17 (citations omitted).

Instead of basing their conclusions on a balancing of all three of the *Penn Central* factors in light of the factual record, the Ninth Circuit and many of the other courts that follow its reasoning substitute a supposition that the offending regulation must have resulted in a low purchase price for the property owner:

> One reason why these distinctions matter is that even though in *Palazzolo* title passed to the plaintiff after the land use restriction was enacted, he acquired his economic interest as a 100% shareholder in the corporation owning the land before the land use restriction was enacted, and title shifted to him because his corporation was dissolved, not because he bought the property for a low price reflecting the economic effect of the regulation.

Pet. App. 15a. Like the Ninth Circuit, other courts reach similar conclusions, based only on their naked assertions (never supported by the factual record) that "the owner presumably paid a discounted price

for the property. Compensating him for a 'taking' would confer a windfall." *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994) *quoted in Forest Props., Inc. v. United States*, 39 Fed. Cl. 56, 77 (1997) ("[I]t is assumed that when a property owner purchases property that is subject to regulations which may proscribe, or limit certain uses of the property, 'the owner presumably paid a discounted price for the property. Compensating him for a "taking" would confer a windfall.'"). *See also Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 638 (Minn. 2007) (concluding the investment-backed expectations factor weighed against post-enactment purchaser in part because "the purchase price reflected the significant restrictions imposed on the use of the property."); *Sagarin v. City of Bloomington*, 932 N.E.2d 739, 744 (Ind. Ct. App. 2010) ("Sagarin's purchase of the property with the knowledge of the easement defeats any possible economic injury because that circumstance was an implicit consideration in the price negotiation of the home. Therefore, he has no basis for an inverse condemnation claim."); *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 673 N.E.2d 61, 70 (Mass. Ct. App. 1996) ("When FIC purchased the property in 1992, the Blackstone wetlands by-law was already in effect. . . . The price FIC paid for the entire thirty-eight-lot parcel should have reflected the limitations imposed by the wetlands by-law.").

State courts, which after *Williamson County Regional Planning Comm'n v. Hamilton Bank of*

Johnson City, 473 U.S. 172 (1985) consider the vast majority of federal Fifth Amendment takings claims, have not fared much better in applying *Palazzolo* consistently or uniformly. For example, some state courts pay lip service to *Palazzolo*'s rejection of the notice rule, but apply it anyway:

• In *LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 789 (Ill. Ct. App. 2003), the Illinois Court of Appeals acknowledged *Palazzolo*, but interpreted this Court's admonition against post-enactment bars to takings claims as requiring only that "such knowledge [is] not, *ipso facto*, an absolute bar." The Illinois court held that "while knowledge of a regulation at the time of ownership is not an absolute bar to a zoning challenge, it is proper to consider that the zoning restriction existed at the time of the plaintiff's acquisition in determining whether the plaintiff's investment-backed expectations have been met." *Id.* Based in part on the fact that the restriction pre-dated the plaintiff's ownership, and Illinois case law pre-dating *Palazzolo*, the Illinois court concluded that no taking had occurred. *Id.*

• In *K & K Const., Inc. v. Dep't of Envtl. Quality*, 705 N.W.2d 365, 382 (Mich. Ct. App. 2005), the court referenced *Palazzolo*, but found no taking because, "equity is no better served by ignoring a claimant's knowledge of existing land-use regulations than it would be by holding that the claimant's knowledge of those regulations absolutely barred recovery regardless of how inequitable those regulations might be."

- In *Prosser v. Kennedy Enters., Inc.*, 179 P.3d 1178, 1182 (Mont. 2008), the court noted in dicta in a non-inverse condemnation case that if applied, the *Palazzolo* rule would be subject to Montana precedent that "a party cannot complain regarding alleged diminution in value caused by a government action when she purchased the property after the government action."

- In *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 639 (Minn. 2007), the court found that investment-backed expectations for a post-enactment purchaser favored the city.

- In *Sanderson v. Town of Candia*, 787 A.2d 167, 169 (N.H. 2001), the court concluded that "the plaintiff purchased the property knowing both of the ordinance's frontage requirements and that the property lacked the required frontage. Thus, she purchased the hardship of which she now complains."

Other state courts remain faithful to *Palazzolo*'s teachings:

- In *Bd. of Supervisors of Culpeper County v. Greengael, L.L.C.*, 626 S.E.2d 357, 369 (Va. 2006), the court held that "[t]hough the regulations Greengael challenges were in effect when it acquired the property, this fact does not per se preclude Greengael from raising a regulatory taking claim." *Id.* at 369 (internal citation and footnote omitted).

- In *Ala. Dep't of Transp. v. Land Energy, Ltd.*, 886 So.2d 787, 798-99 (Ala. 2004), the Alabama

Supreme Court affirmed a lower court decision that a regulatory taking had occurred due to interference with investment-backed expectations even where the owner acknowledged that at the time of purchase it did not own surface rights and knew it would have to obtain consent of surface owner to conduct surface mining.

- In *Callan v. City of Laguna Beach*, No. G029020, 2003 WL 204734, *4 (Cal. Ct. App. Jan. 30, 2003), *rev'd on other grounds*, 2003 WL 22026702 (Cal. Ct. App. Aug. 29, 2003) the court rejected the city's argument that "even pretending that the City's 1974 adoption of the minimum lot size ordinances constituted a 'taking' of the property, Plaintiffs purchased the property subject to the 'taking' and are forever precluded from any legal challenge based upon inverse condemnation," and reiterating that "postenactment purchase does not bar the Callans's suit[.]"

- In *Rukab v. City of Jacksonville Beach*, 811 So.2d 727, 733 (Fla. Dist. Ct. App. 2002), the court relied upon *Palazzolo* to find that there is "no legal support for the contention that the Rukabs are somehow precluded from asserting their constitutional rights within the eminent domain proceeding because they bought the property subject to the previous determination of blight."

- In *East First Street, L.L.C. v. Bd. of Adjustments*, No. 2007 CA 0664, 2008 WL 2567080, at *3-4 (La. Ct. App. June 6, 2008), the court recognized the

lower court's "erroneous belief" "that the Applicant's takings claims were barred by their acquisition of the subject properties after enactment of the zoning regulations," thus, "the district court erred to the extent it found that the Applicants created for themselves the hardship caused by the zoning restriction."

• In *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*, 793 A.2d 545, 555-61 (Md. 2002), the court held that the landowner's purchase of the property, with notice that the property was subject to area restrictions, including a critical area buffer zone for wetlands and county zoning provisions, was not a self-created hardship that precluded the landowner from receiving an area variance.

• In *KCI Management, Inc. v. Bd. of Appeal of Boston*, 764 N.E.2d 377, 380 (Mass. App. Ct. 2002), the court held that a challenge to regulation was timely, and concluded "[w]e see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning provisions first affected it."

• In *Manor v. Reisma*, No. C.A. PC89-2447, 2003 WL 1224248, *7 (R.I. Feb. 24, 2003), the court found a compensable taking and standing pursuant to *Palazzolo* where a claim for inverse condemnation had been assigned to the plaintiff who acquired property after effective date of regulation.

• In *State* ex rel. *Shelly Materials, Inc. v. Clark Cty. Bd. of Comm'rs*, 875 N.E.2d 59, 67-68 (Ohio 2007), the court held that notice is relevant, but

absent a *Penn Central* claim, *Palazzolo* does not apply.

• In *Prakash v. Copley Twp. Trs.*, No. 21057, 2003 WL 294365, *3 (Ohio Ct. App. Feb. 12, 2003), the court held that evidence of prior notice of a regulation was inadmissible at trial under *Palazzolo*.

• In *State* ex rel. *Shemo v. Mayfield Heights*, 765 N.E.2d 345, 352 (Ohio 2002), the court rejected the government's "notice" argument.

The lower courts' varying approaches to the scope of *Palazzolo*'s rejection of the notice rule reflect that this Court's intervention is needed. *Penn Central*'s factors have been the subject of academic criticism and a call for clarification:

> If the *Penn Central* test is to serve as more than legal decoration for judicial rulings based on intuition, it is imperative to clarify the meaning of *Penn Central*.

John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 174-75 (2005). Yet, "intuition" and voodoo economics, not the rule of law appear to be what guided the Ninth Circuit to come up with its arbitrary "fatal" rule. Since *Penn Central* indeed appears to be "here to stay," the petition in the case at bar presents the opportunity to clarify that "set formulas" such as those imposed by the Ninth Circuit in this case and in the other lower courts which have found ways around *Palazzolo* should not be permitted.

II. THE RIGHT TO MAKE REASONABLE USE OF PROPERTY IS A PERSONAL RIGHT

The right to make reasonable use of property is a fundamental constitutional right:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). Thus, a takings claim is, in essence, an owner's challenge to the state's ability to restrict *her* rights to make reasonable use of her property through its police power when "in all fairness and justice" the burdens the regulations concentrated solely on her "should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987) ("[t]he entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without [institution of eminent domain] proceedings").

The Ninth Circuit's fundamental flaw was its treatment of a property owner's takings claim as something other than a personal right. Instead, the Ninth Circuit treated the right as one that inures to the property, and not its owner. However, it is the

Guggenheims' rights to make use of their property – not their predecessor-in-title's – that is at issue in this case. Even if the takings claim here was only the prior owner's, the Ninth Circuit wrongly assumed it could not be transferred to the Guggenheims. *See, e.g.*, *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 275 (2008) ("And we have discovered that history and precedent are clear on the question before us: Assignees of a claim, including assignees for collection, have long been permitted to bring suit."). This Court has repeatedly held that the right to own property and the right to make reasonable use of it free of unconstitutional interference may be passed to future owners. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Court confirmed that the ability to transfer property by will – in that case, the ability to devise fractional interests in Indian land – was itself a property right that could not be taken without compensation. *Id.* at 718. *See also Palazzolo*, 533 U.S. at 627 ("The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself."). The Ninth Circuit's decision failed to recognize that *inter vivos* transfers are similarly protected.

Additionally, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) undercuts the Ninth Circuit *en banc* majority's attempt to distinguish *Palazzolo* on the basis that in that case, the owner

took title from his closely-held corporation, while the Guggenheims purchased their property in an arm's-length transaction. In *Nollan*, lessors of property with an option to buy sought a permit to build a home from the Coastal Commission, which granted the permit conditioned upon the lessors agreeing to dedicate a public easement across the land to allow the public to access the beach. *Id.* at 827-28. The trial court invalidated the condition, and while the case was on appeal, the lessors exercised their option and purchased the land. *Id.* at 830-31. Even though the exaction was imposed by the Commission when the Nollans were lessors and had not yet owned the property, this Court explained "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* at 833 n.2.

Four years later in *Palazzolo*, this Court concluded that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Palazzolo*, 533 U.S. at 627. Palazzolo's claim was "not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 630. The Court characterized the rule "that any award goes to the owner at the time of the taking" and "is not passed to a subsequent purchaser" as applying "[i]n a direct condemnation action, or when a State has physically invaded the property," where "the fact and extent of the taking are known." *Id.* at 628 (citing *Danforth v. United States*,

308 U.S. 271, 284 (1939)). In the case at bar, the Guggenheims' predecessor in title could not have sued the City of Goleta for its restrictions on his right to make use of his property because the City of Goleta did not exist until after the Guggenheims purchased it. *Cf. Palazzolo*, 533 U.S. at 628 (describing situation "where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner").

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests the Court grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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